(2)

No. 04-433

Supreme Court, U.S.
FILED
OCT 29 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

JOSEPH ANZA, VINCENT ANZA, and NATIONAL STEEL SUPPLY, INC.,

Petitioners,

v.

IDEAL STEEL SUPPLY CORPORATION.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Marshall Beil
Counsel of Record
MCGUIREWOODS LLP
1345 Avenue of the Americas
Seventh Floor
New York, New York 10105
Telephone: (212) 548-7004
Facsimile: (212) 715-2319

E. Duncan Getchell, Jr.
Robert L. Hodges
MCGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
Telephone: (804) 775-1000
Facsimile: (804) 698-2061

Counsel for Respondent

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

1. The Court Has Settled the Law of Proximate Cause Under RICO 1

2. Petitioners Have Not Shown A Significant Split Between the Circuits on the Issue of Proximate Cause under RICO for Competitor Injury 2

3. Petitioners' "Standing" Issue was Never Raised Below 8

4. There Is No Conflict Between RICO and the Antitrust Laws 9

5. The Nature of the Proximate Cause Enquiry Makes it Unsuitable for Disposition as a Matter of Law on the Pleadings 9

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

Andrews v. American Telegraph & Telegraph, Co., 95 F.3d 1014 (11th Cir. 1996) 4

Bender v. Southland Corp., 749 F.2d 1205 (6th Cir. 1984) 4

Brandenburg v. Seidel, 859 F.2d 1179 (4th Cir. 1988) 6

Central Distributors of Beer, Inc. v. Conn, 5 F.3d 181 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994) 7

County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2d Cir. 1990) 5, 6

Heath v. Alabama, 474 U.S. 82 (1985) 8

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 1, 2, 10

Ideal Steel Supply Corp. v. Anza, 373 F.3d 251 (2d Cir. 2004) 3, 5

Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250 (7th Cir. 1995), *cert. denied*, 517 U.S. 1220 (1996) 6, 8, 9

Johnson v. Jones, 515 U.S. 304 (1995) 10

Kenty v. Bank One, Columbus, N.A., 92 F.3d 384 (6th Cir. 1996) 4

Lancaster Committee Hospital v. Antelope Valley Hospital District, 940 F.2d 317 (9th Cir. 1991) 9

Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc., 18 F.3d 260 (4th Cir.), *cert. denied*, 513 U.S. 931 (1994) 3, 8

Moses H. Cone Mem. Hospital v. Mercury Const. Corp., 460 U.S. 1 (1983) 9

Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir. 1991) 5

Poulos v. Caesar's World, Inc., 379 F.3d 654 (9th Cir. 2004) 5

Procter & Gamble Co. v. Amway Corp., 242 F.3d 539 (5th Cir. 2001) 6

Quackenbush v. Allstate Insurance Co., 517 U.S. 506 (1996) 6

Sikes v. Teleline, Inc., 281 F.3d 1350 (11th Cir.), *cert. denied*, 537 U.S. 884 (2002) 4

Summit Properties, Inc. v. Hoechst-Celanese, Inc., 214 F.3d 556 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001) 4, 6

Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002) 10

Systems Mgt., Inc. v. Loiselle, 303 F.3d 100 (1st Cir. 2002) 5

VanDenBroeck v. CommonPoint Mort. Co., 210 F.3d 696 (6th Cir. 2000) 4

STATE CASES

Ruffing v. Union Carbide Corp., 308 A.D.2d 526, 764 N.Y.S.2d 462 (2003) 5

FEDERAL STATUTES

Fed.R.Civ.P. 12(b)(6) 10

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c) 1

Respondent Ideal Steel Supply Corporation submits that this is not a case in which the Court should grant the petition for writ of *certiorari*. The Court has conclusively addressed the core issue raised in the petition so that this appeal simply involves an application of settled law to the particular factual averments of the case. Because the controlling law is settled, the claim of a circuit split does not involve a divergence of doctrine but application of settled law to particular facts. In fact, the decision below, far from creating a split, builds on a solid foundation of case law. Furthermore, to buttress their claim of a split among the circuits, petitioners have raised a wholly new issue – standing – not raised in the court of appeals.

There is an additional reason why no writ should issue. This case comes before the Court on a decision reversing dismissal of the complaint for failure to state a claim on which relief can be granted. Thus, the review is interlocutory as the case goes forward in the district court. Hence, the posture of the case below also counsels against consideration without a concrete record developed through discovery and trial. Simply put, this case is not a good vehicle for resolving a split among the circuits even if one existed.

1. The Court Has Settled the Law of Proximate Cause Under RICO.

Petitioners concede, as they must, that the Court settled the "basic approach" for proximate cause under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c), in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). The Court said that it used the term proximate cause to "label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." 503 U.S. at 268. The Court observed that it could not

lay down specific requirements for all factual situations that might arise with respect to proximate cause under RICO. *Id.* at 272 n.20. Instead, the Court left the development of the law within the general requirements of *Holmes* to the lower federal courts. *Id.*

Thus, the general rule of proximate cause under RICO is a matter of settled law. The Court has recognized that the application of the rule of *Holmes* in a particular case is an enquiry that depends on the particular facts and circumstances in each case. In view of the Court's opinion in *Holmes*, it should come as no surprise that different results may arise from the same rule applied to different facts. In fact, the results raised by petitioners as constituting a conflict are readily explained by their arising from different facts.

2. Petitioners Have Not Shown A Significant Split Between the Circuits on the Issue of Proximate Cause under RICO for Competitor Injury.

When they posit the need for intervention of the Court in the supposed split in the circuits, petitioners seek to come within the provisions of Sup.Ct.R. 10(a), that a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. What petitioners do is to mix and match issues to suggest a conflict, where proper analysis shows that the courts of appeals are largely if not wholly in accord.

In their attempt to show a split, petitioners move back and forth between two legal issues. The more general issue is the requirement for reliance on the misrepresentations in mail fraud to meet the requirement for proximate cause when such mail fraud is a predicate act under RICO. The federal courts have generally held that such reliance is required. The

more specific issue, and the one raised by the case here, is whether reliance by the plaintiff is required when plaintiff is the target of the fraudulent scheme and suffers direct injury by reason of reliance by third parties to whom the misrepresentations were directed, but on which it did not itself rely. Here, Ideal Steel averred that it was the target of a scheme to defraud by National Steel Supply Corporation's not charging applicable sales taxes and filing false sales tax returns, enabling National to offer customers lower overall prices on commodity-type goods and compete unfairly against Ideal Steel in a two-company, price-sensitive market. In this more specialized case, the courts have almost uniformly held that third-party reliance is sufficient if the plaintiff has suffered direct injury as a result.

The court below followed the decision of the Fourth Circuit in *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260, 263-64 (4th Cir.), *cert. denied*, 513 U.S. 931 (1994). In *Mid Atlantic*, a competitor made fraudulent mailings soliciting customers of the plaintiff by offering artificially low rates. The actual rates were not as low as represented. The *Mid Atlantic* court rejected the argument that the plaintiff was not a victim because it did not receive the fraudulent mailings. Instead, the court held that Mid Atlantic had alleged a distinct and independent injury that was caused directly to it, and was not asserting a claim derivative of losses asserted by its former customers. On the authority of *Mid Atlantic* as well as several Second Circuit cases, the court below held that Ideal Steel had properly alleged an injury proximately caused by defendants' mail frauds that were relied upon by a third party, whose reliance was critical to the scheme's success. *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 261-62 (2d Cir. 2004).

In almost every case involving this kind of claim, the courts of appeals have reached that same conclusion as the court below. The application of the general requirement of

reliance to the special case of competitor injury is best illustrated in *Summit Properties, Inc. v. Hoechst-Celanese, Inc.*, 214 F.3d 556, 561 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001). In *Summit*, the Fifth Circuit held that there was a general requirement for reliance where the RICO predicate acts were mail fraud, but stated that there was an exception when a competitor was the target of a fraudulent scheme accomplished by defrauding others, as when a competitor lured customers away by a fraud directed at plaintiff's customers. This is consistent with the decision below and with the Fourth Circuit's decision in *Mid Atlantic*.

On the other side of the alleged split, the petitioners place the Sixth Circuit, *VanDenBroeck v. CommonPoint Mort. Co.*, 210 F.3d 696, 701 (6th Cir. 2000), and the Eleventh. *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360 (11th Cir.), *cert. denied*, 537 U.S. 884 (2002). Petition, at 6. But *VanDenBroeck v. CommonPoint Mort. Co.* is not a case involving the kind of targeted scheme found in *Mid Atlantic* or the case below. *VanDenBroeck* was a class action by borrowers over undisclosed fees by a home mortgage lender. The cases on which the *VanDenBrock* court relied, *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 390 (6th Cir. 1996), a consumer finance case involving an auto loan, and *Bender v. Southland Corp.*, 749 F.2d 1205, 1215-16 (6th Cir. 1984), dealing with claims of coercion of franchisees, were not competitor cases either. *Bender*, of course, antedates *Holmes*.

Similarly, the Eleventh Circuit's decision in *Sikes v. Teleline, Inc.*, is also not a case of a fraudulent scheme accomplished by defrauding others. The *Sikes* court cites *Andrews v. American Tel. & Tel., Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996), and *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991). *Sikes* and *Andrews* were similar cases involving customer class actions against long distance telephone companies that provided "900" numbers for

companies offering games of chance. The issue of reliance arose in connection with the propriety of certifying the case as a class action in which individual reliance would be an issue. *Pelletier* was a securities fraud case brought directly by the alleged victim of the misrepresentation. None of these cases present a common or even similar fact pattern to the case below or *Mid Atlantic*.

Then petitioners cite to *Poulos v. Caesar's World, Inc.*, 379 F.3d 654, 666 n.3 (9th Cir. 2004), because, petitioners say, that case cites examples of the split between the circuits. Petition, at 6. However, the court in *Poulos* was addressing the general requirement of reliance as an element of causation, not the more specialized case of targeted injury through third-party reliance. But this supposed split on the general issue of reliance is itself elusive. The only case that *Poulos* cites as not requiring reliance is *Systems Mgt., Inc. v. Loiselle*, 303 F.3d 100, 103-04 (1st Cir. 2002). The *Loiselle* court said that reliance was the most obvious way that mail fraud can cause harm, but that it was not the only way. But the actual holding in the case was that there was no RICO violation because there was no pattern of racketeering activity. *Id.* at 106.

A general requirement for reliance is of course broad enough to include third-party reliance. As the court below noted, in *County of Suffolk v. Long Island Lighting Co. ("LILCO")*, 907 F.2d 1295, 1311 (2d Cir. 1990), one of the cases cited in *Poulos*, while reliance was required, "we plainly accepted the principle that a RICO claim based on mail fraud may be proven where the misrepresentations were relied on by a third person, rather than by the plaintiff." *Ideal Steel*, 373 F.3d at 262.[1]

---

[1] This is also the law in New York. *Ruffing v. Union Carbide Corp.*, 308 A.D.2d 526, 528, 764 N.Y.S.2d 462, 465 (2003). "[T]he holding of Holmes is no more than that common law ideas about proximate causation inform the understanding of RICO." *Israel Travel*

Similarly, the court in *Mid Atlantic* correctly refrained from reading the Fourth Circuit case cited in *Poulos*, *Brandenburg v. Seidel*, 859 F.2d 1179, 1188 n. 10 (4th Cir. 1988), *overruled on other grounds*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 506, 531 (1996), as imposing any invariable requirement of victim reliance. Instead, the court said, "We did not ... intend to establish a rule that only injuries to the immediate victim of a predicate act would satisfy the 'by reason of' requirement of [18 U.S.C.] § 1964(c)." *Mid Atlantic*, 18 F.3d at 263.

Nothing in *Poulos* suggests that there is any split among the circuits on whether third-party reliance is sufficient where a plaintiff shows that it is the target of the fraudulent scheme and is directly injured by it. The alleged split is the result of petitioners' lack of clarity with respect to what the "important matter" under Sup.Ct.R. 10(a) in fact is.

When the issue of reliance generally is distinguished from the specialized case of injury to a target of the scheme through third-party reliance at issue here, the purported split largely evaporates. The court below followed the Fourth Circuit decision in *Mid Atlantic* and the Second Circuit's decision in *LILCO*, 907 F.2d at 1311. When it reviewed a case alleging injury based on third-party reliance, the Fifth Circuit, citing *Mid Atlantic* and true to its dictum in *Summit*, also held that the facts stated a claim under RICO. *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 565 (5th Cir. 2001).

While petitioners devote the largest part of their brief dealing with any single case to *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995), *cert. denied*, 517 U.S. 1220 (1996), they concede

---

Advisory Service, Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250, 1257 (7th Cir. 1995), *cert. denied*, 517 U.S. 1220 (1996).

that the *Israel* court accepted and followed the Fourth Circuit's decision in *Mid Atlantic Telecom*, expressly stating that it did so to avoid creating a conflict among the circuits. *Israel*, 61 F.3d at 1257.

Although the Sixth and Eleventh Circuits require reliance generally, the Eleventh Circuit simply has not spoken to the issue of targeted injury based on third-party reliance that the Fifth Circuit highlighted in *Summit* and approved in *Procter & Gamble*, and that the Second and Fourth Circuits recognized in this case and *LILCO* and in *Mid Atlantic* respectively.

This leaves one case, *Central Distributors of Beer, Inc. v. Conn*, 5 F.3d 181 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994), arguably in conflict. *Central* involved claims that the defendants engaged in mail and wire fraud in invading plaintiff's exclusive marketing territory and competing unfairly with plaintiff. The *Central* court, relying on *Bender*, *supra*, upheld summary judgment for the defendants because plaintiff was required to show, and could not show, that the defendant made misrepresentations directly to the plaintiff. *Central*, 5 F.3d at 184. But *Central* was decided more than a decade ago and only eighteen months after *Holmes*, and this Court denied *certiorari*. Since that time, the case law on this issue has followed the Fourth Circuit's decision in *Mid Atlantic Telecom* rather than *Central*, as did the court below.

Thus, the trend of the case law is clear. The decision below did not open up or widen any split. Rather than a split, the case law shows an emerging consensus. *Mid Atlantic Telecom*, the case followed by the court below, represents the majority position. Petitioners have failed to show that there is a split in the circuits on an important matter that requires this Court's attention.

3. Petitioners' "Standing" Issue was Never Raised Below.

The thinness of the case for a circuit split is perhaps best illustrated by petitioners' need to raise a wholly new issue in their petition, which petitioners call "standing". *See* Petition, at 8-9. In fact, the referenced part of *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d at 1257-58, deals with the requirement under *Holmes* that the plaintiff's injury be direct and not derivative. In this case, the injury was direct and standing was not an issue that was raised, either at the motion to dismiss stage in the district court or on appeal.

There is a longstanding rule that the Court will not consider issues raised for the first time in a petition for writ of certiorari. *Heath v. Alabama*, 474 U.S. 82, 87 (1985). If the issue is in fact one of statutory standing, it has not been raised or developed in this case.

In fact, the Seventh Circuit's analysis in *Israel,* 61 F.3d at 1258, merely held that, on the facts before it, the seller plaintiff's injury was derivative, because its customers, not it, were the victims of the fraud. In the case below, the court of appeals held that Ideal Steel's injury was direct, because it was both the target and the victim of the fraud. *Ideal Steel*, 373 F.3d at 264. This is a natural – and appropriate -- result of different facts.

But even in its holding that the injury in the case before it was indirect, and thus did not satisfy *Holmes*, the Seventh Circuit did not conclude that its ruling required departure from the precedent of *Mid Atlantic*. Instead, the court followed the ruling of the Ninth Circuit in *Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 317, 405-06 (9th Cir. 1991), saying: "We are no more inclined to create a conflict on this question than we were on the *Mid Atlantic* issue …" 61 F.3d at 1258. Clearly sensitive to the

issue of conflict among the circuits, the Seventh Circuit did not perceive the conflict that petitioners ask the Court conclude the decision below raises here.

4. There Is No Conflict Between RICO and the Antitrust Laws.

Petitioners next suggest another theory that they did not urge below: that the decision in this case creates a conflict between RICO and the antitrust laws, and threatens to turn RICO into a federal law of unfair competition. But as the Seventh Circuit noted in *Israel*, "*Holmes* explicitly refrained from importing a theory akin to the antitrust-injury doctrine into the law of RICO." *Israel*, 61 F.3d at 1257.

Moreover, *Mid Atlantic* was decided in 1994 on the same principles as the case below. Petitioners cite no court decision or commentary that discusses or even posits the conflict asserted in the petition. If there were a conflict between RICO and the antitrust laws, no one seems to have noticed, and, in any event, such conflict would be a matter for Congress, not the federal courts.

5. The Nature of the Proximate Cause Enquiry Makes it Unsuitable for Disposition as a Matter of Law on the Pleadings.

Because the court of appeals reversed the district court's dismissal, the case below is proceeding in the district court and this petition is interlocutory. Consideration of this case at this time would violate the principle that there not be piecemeal review of the steps toward a final judgment in which they would merge. *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 12 n.3 (1983).

The present posture of this case underscores its unsuitable nature for consideration by the Court. This case

comes before the Court on a ruling on a motion to dismiss under Fed.R.Civ.P. 12(b)(6). The court of appeals reversed the dismissal and remanded the case for further proceedings. *Ideal Steel*, 373 F.3d at 265. There is no stay in effect and the parties are engaged in extensive discovery in the district court. The present case management order requires discovery to be completed by November 26, 2004: the district court has scheduled a meditation session for a few days later.[2]

This Court has recognized that the issue of proximate cause under RICO requires an enquiry informed by the particular concerns identified by the Court. *Holmes*, 503 U.S. at 272 n.20. There has been as yet no concrete development of the facts. As the Court has recognized, piecemeal interlocutory review is disfavored because it involves the Court in reviewing matters that may well be subject to future review after development through discovery and trial. *See, e.g., Johnson v. Jones*, 515 U.S. 304, 315-17 (1995). In addition, on issues in which the facts play a major role, decision as a matter of law on the pleadings is disfavored. *See, e.g., Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002).

CONCLUSION

The petitioners have failed to present an issue that merits the Court's attention, either as a significant question of federal law on which the circuits are in fact divided, or, with respect to the standing issue, one which was raised and decided in the courts below. Furthermore, interlocutory rulings of the sort present here are disfavored as vehicles for resolving other important matters. For these reasons, respondent prays that the petition for writ of *certiorari* will be denied.

---

2 The parties have requested a short extension of this schedule.

Respectfully Submitted,

Marshall Beil, *Counsel of Record*
McGuireWoods LLP
1345 Avenue of the Americas
Seventh Floor
New York, New York 10105
Telephone: (212) 548-7004
Facsimile: (212) 715-2319

E. Duncan Getchell, Jr.
Robert L. Hodges
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
Telephone: (804) 775-4319
Facsimile: (804) 698-2061

Dated: October 29, 2004